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NO.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

George L. Mothershed,

Petitioner,

v.

Honorable Marian P. Opala,
Honorable Ralph B. Hodges,
Honorable Robert E. Lavender,
Honorable Robert D. Simms,
Honorable Joseph M. Watt
Honorable Rudolph Hargrave,
Honorable Justice Alma Wilson,
Honorable Yvonne Kauger, and
Honorable Hardy Summers
Justices of the Supreme Court
for the State of Oklahoma,

Respondents.

PETITION FOR WRIT OF MANDAMUS

George L. Mothershed, OBA#6472
115 Alpine Avenue
Los Gatos, CA 95032-7130
Telephone (408) 395-7963
Petitioner, Pro se

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Issues Presented to this Court

The issues presented herein are as follows:

1. Did the court below not only abuse discretion in denying petitioner relief, but did the court below have an affirmative duty under the equal protection and due process clauses of the Fifth and Fourteenth Amendments to the Constitution to vacate a judgment procured by prevailing party where there was judicial admission of fact of fraud practiced on the trial court, through sale of the administration of justice, by opposing party and/or their privies?

2. Did the court below not only abuse discretion where it failed to even consider applicable facts, but was such failure a *de facto* denial of a fair hearing as assured all litigants under the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the Constitution?

3. Did the court below not only abuse discretion where it failed to even consider applicable legal standards, but was such failure a *de facto* denial of a fair hearing as assured all litigants under the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the Constitution?

TABLE OF CONTENTS

page(s)

TABLE OF CASE AUTHORITY ..... ii-ix

I. Order and Opinion Below 3

II. Jurisdiction 3-8

III. Constitutional Provisions and Statutes Involved 8-12

IV. Existence of Jurisdiction Below 12-14

V. Statement of Facts 14-29

A. Nature of the Case 14-15

B. Context of the Ruling 15-25

C. Prior Proceedings 25-27

D. History of Trial Court Excessive Use of Judicial Power 27-29

VI. Standard of Review 29

VII. Reason for Granting Writ 29-52

POINT I:

NOT ONLY, THE COURT BELOW ABUSED DISCRETION IN DENYING PETITIONER RELIEF, BUT THE COURT BELOW HAD AN AFFIRMATIVE DUTY UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES TO VACATE A JUDGMENT WHERE THERE WAS JUDICIAL ADMISSION OF FACT OF FRAUD PRACTICED UPON THE TRIAL COURT BY OPPOSING PARTY. 30-36

TABLE OF CONTENTS

page(s)

POINT II:
THE COURT BELOW ABUSED DISCRETION WHERE IT FAILED TO EVEN CONSIDER APPLICABLE FACTS, e.g. JUDICIAL ADMISSIONS OF FRAUD PRACTICED ON THE TRIAL COURT BY A PREVAILING PARTY AND/OR HER PRIVIES THROUGH THE SALE OF THE ADMINISTRATION OF JUSTICE BY THE TRIAL COURT 36-41

POINT III:
THE COURT BELOW ABUSED DISCRETION WHERE IT FAILED TO EVEN CONSIDER APPLICABLE LAW 41-52

VIII. Issues Presented 52-53

IX. Exhibits 53-64

X. Interested Parties 64

XI. Conclusion 64-65

TABLE OF AUTHORITIES

TABLE OF UNITED STATES CONSTITUTION AUTHORITIES:

Fifth Amendment United States Constitution 7, 8, 18, 28, 29, 35, 36, 41, 52, 53,

Fourteenth Amendment, United States Constitution 7, 9, 18, 28, 35, 36, 41, 45, 52, 53,

TABLE OF CONTENTS

page(s)

TABLE OF CONSTITUTION OF THE STATE OF OKLAHOMA AUTHORITIES:

Section 6, Article 2, Oklahoma Constitution 4, 7, 9, 13, 18, 45

Section 4, Article 7, Oklahoma Constitution 10, 13, 18, 42

TABLE OF UNITED STATES STATUTES:

28 U.S.C. Sec. 1291 3

28 U.S.C. Sec. 1257 5

28 U.S.C. Sec. 1651(a) 3

TABLE OF OKLAHOMA STATUTES:

Oklahoma Statutes Annotated (1991), Title 12, Sec. 1031(4) 6, 11, 13, 18, 42, 43, 44, 45, 64,

Oklahoma Statutes Annotated (1991), Title 12, Sec. 1038 ..... 6, 11, 13, 18, 42, 43, 44, 45, 64,

Oklahoma Statutes Annotated (1991), Title 12, Sec. 2011 [i.d. Fed.R.Civ.P. 11] 50

Oklahoma Statutes Annotated (1991), Title 12, Sec. 2202(d) [i.d. Fed.R.Evid. 201(d)] 54

Oklahoma Statutes Annotated (1991), Title 12, Sec. 2901 (b)(7) [i.d. Fed.R.Evid. 901(b)(7)] 21

TABLE OF CONTENTS

page(s)

TABLE OF OKLAHOMA AUTHORITIES (continued):

Oklahoma Statutes Annotated (1991), Title 22,
Sec. 152 ..... 12, 42, 44,

TABLE OF CASE AUTHORITY:

Andrews v. Virginia R. Co.,
248 U.S. 272, 39 S.Ct. 101, 63 L.Ed. 236 (1919) 4,

Armstrong v. Manzo,
380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965) 40,

In re Bomgardner, 711 P.2d 92 (Okl. 1986) 44,

Brinkerhoff-Farris Trust & Savings v. Hill,
281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) 39,

Brouder v. Director, Dept. of Corrections,
434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521,
24 Fed.R.Serv.2d 749, *rehearing denied* 434 U.S. 1089,
98 S.Ct. 1286, 55 L.Ed.2d 795 (1978) 29,

Chicago & N. W. R. Co. v. Nye Schneider Fowler Co.,
260 U.S. 35, 43 S.Ct. 55, 67 L.Ed. 115 (1922) 46,

Citizens to Preserve Overland Park, Inc. v. Volpe,
401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) 29,

Colorado River Water Conservation Dist. v. United States,
424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 838 (1976) 5,

Continental Tel. Co. of Oklahoma v. Hunter,
590 P.2d 667 (Okl. 1979) 28,

TABLE OF CONTENTS

page(s)

TABLE OF AUTHORITIES (continued):

TABLE OF CASES (continued):

Davis v. Webster,
263 U.S. 22, 44 S.Ct. 13, 68 L.Ed. 143 (1923) 6,

Dausuel v. Dausuel,
(1952) 90 App. D.C. 275, 195 F.2d 774,
19 A.L.R. FED 761 51,

Gibson v. Berryhill,
411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973) . 33, 35,

Grubb v. Hunter, 573 P.2d 699 (Okl. 1978) 27,

Hazel-Atlas Glass Co. v. Hartford-Empire Co.,
322 U.S. 238, 64 S.Ct. 997, 88 L.Ed 1250, 61 U.S.P.Q. 241,
rehearing denied 322 U.S. 1281,
88 L.Ed 1596 (1944) 22, 31,
37, 50,

Israel Aircraft Ind., Ltd. v. Standard Precision, 559 F.2d 203
(2nd Cir. 1977 N.Y.) 32, 38,

Jackson v. Irving Trust Co., 311 U.S. 494, 61 S.Ct.326,
85 L.Ed. 297 (1941) 32,

Jenkins v. McKeithen,
395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404,
rehearing denied, 396 U.S. 869,
90 S.Ct. 35, 24 L.Ed.2d 123 (1969) 40,

TABLE OF CONTENTS

page(s)

TABLE OF AUTHORITIES (continued):

TABLE OF CASES (continued):

Johnson v.Johnson,
424 P.2d 414 (Okla. 1967) 17, 31, 35
43, 45, 47, 51,

Kupferman v. Consolidated Research & Manufacturing Corp.,
459 F.2d 1072, 19 A.L.R. Fed 747 (2nd Cir. 1972 N.Y.) . 32,

Liss v. Trans Auto Systems, 68 N.Y.2d 15,
496 N.E.2d 851, 505 N.Y.S.2d 831 (1986) 5,

Lockwood v. Bowles, (DC.DC. 1969)
46 F.R.D. 625, 634, 13 Fed.Rul.Serv.2d 1299 51,

Mallonee v Grow, (Alas. 1972) 502 P.2d 432 51,

Martin v. Hunter's Leasee,
1 Wheat. 304, 4 L.Ed. 97 (U.S. 1816) 4,

Maurbury v. Madison,
1 Cranch 137, 2 L.Ed. 137 (U.S. 1803) 4, 43,

Merrit v. Hunter, 575 P.2d 623 (Okl. 1978) 27,

Migra v. Warren City School Board of Education,
465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) 5

Oklahoma County Sheriff v. Hunter,
615 P.2d 1007 (Okl. 1980) 28,

TABLE OF CONTENTS

page(s)

TABLE OF AUTHORITIES (continued):

TABLE OF CASES (continued):

Peacock Records, Inc. v. Checker Records, Inc.,
365 F.2d 145, 10 Fed.Rul.Serv.2d 1496
(7th Cir. 1966 Ill.); *certiorari denied*
385 U.S. 1003, 87 S.Ct. 707, 17 L.Ed.2d 542;
later appealed 430 F.2d 85 (7th Cir.Ill),
certiorari denied 401 U.S. 975, 91 S.Ct. 1193,
28 L.Ed.2d 324 ..... 22, 31, 37, 50

Ex parte Peru, 318 U.S. 578, 63 S.Ct. 793,
87 L.Ed. 1014 (1943) 4,

Railroad Comm'n of Texas v. Pullman Co.,
312 U.S. 229, 61 S.Ct.643, 85 L.Ed. 91 (1941) 4,

Reece v. Georgia,
350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77,
rehearing denied 350 U.S. 943, 76 S.Ct. 292,
100 L.Ed. 822 (1955) 39,

Richfield Oil Corp. v. State Bd. of Equalization,
329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946) 4,

Robb v. Connolly, 111 U.S. 624, 4 S.Ct. 544,
28 L.Ed. 544 (1883) 51,

Root Refining Co. v. Universal Oil Products Co.,
169 F.2d 514 (3rd Cir.1948 Del.), *certiorari denied* 335 U.S.
912, 69 S.Ct. 481, 93 L.Ed 444, *rehearing denied* 336 U.S. 915,
69 S.Ct. 601, 93 L.Ed 1079 (1949) 31, 47,

Sabouri v. Hunter, 596 P.2d 891 (Okl. 1979) 28,

TABLE OF CONTENTS

page(s)

TABLE OF AUTHORITIES (continued):

TABLE OF CASES (continued):

Schroeder v. New York City, 371 U.S. 208,
83 S.Ct. 279, 9 L.Ed.2d 255, 89 A.L.R.2d 1398 (1962) . . . 40,

Societe Internationale v. Rogers,
357 U.S. 197, 78 S.Ct 1087, 2 L.Ed.2d 1255 (1958) 32,

State v. Hunter, 580 P.2d 158 (Okl. 1978) 28,

SouthwesternBank & Trust Company, v. Burton E. Smith and J. Kirk Ashford, (U.S.D.C., West. Dist. Okla, 1984 . . . 57, 59

Summers v. State of Utah, 927 F.2d 1165,
19 Fed.Rul.Serv.3d 751 (10th Cir.1991 Ut.) 38, 42, 52,

Valerio v. Boise Cascade Corp.,
(D.C.Cal., 1978) 80 F.R.D. 626 (Cir. 9th 1981)
645 F.2d 699, certiorari denied 454 U.S. 1126,
102 S.Ct. 976, 71 L.Ed.2d 113 51,

Wilkin v. Sunbeam Corp.,
(Cir. 10, 1972 Kan.) 466 F.2d 714, 175 U.S.P.Q. 139, 16 Fed.Rul. Serv 2d 606, certiorari denied (1973) 409 U.S. 1126,
93 S.Ct. 940, 35 L.Ed.2d 259, 176 U.S.P.Q. 193 51,

Wilson v. State Water Supply Commission,
84 N.J.Eq. 150, 93 A. 732, 733 (1915) 15,

Wisconsin v. Consantineau,
400 U.S. 433, 439, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971 . . . 8,

Whithrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456,
43 L.Ed.2d 712 (1975) 34,

TABLE OF CONTENTS

page(s)

TABLE OF AUTHORITIES (continued):

TABLE OF CASES (continued):

Universal Oil Products v. Root Refining Co.,
238 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447,
rehearing denied 329 U.S. 823, 67 S.Ct 24,
91 L.Ed 700 (1946) 17, 31, 32, 35, 47,

LAW REVIEW ARTICLES AND TREATISES

Friedman, *Res Judicata and Collateral Estoppel*, (1988) . 5

7 Moore, *Federal Practice*, 2d ed. 1991, para 60.23 51,

4 *Wigmore, Evidence*, Sec. 1064,
(Chadborn rev. 1972) 23, 46,

4 *Wigmore, Evidence*, Sec. 1065(3),
(Chadborn rev. 1972) 23, 46,

9 *Wigmore, Evidence*, Sec. 2590,
(Chadborn rev. 1981) 23, 46,

9 *Wigmore, Evidence*, Sec. 2591,
(Chadborn rev. 1981) 23, 46,

Wolfson, *Extraordinary Writs in the Supreme Court Since* Ex Parte Peru, 51 Col. L. Rev. 977 (1951) 4,

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PETITION FOR WRIT OF MANDAMUS

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Petitioner, Pro se

Petitioner, George L. Mothershed applies for a writ of mandamus directed to the, Supreme Court of the State of Oklahoma and to Respondents, Honorable Marian P. Opala, Honorable Ralph B. Hodges, Honorable Robert E. Lavender, Honorable Robert D. Simms, Honorable Joseph M. Watt, Honorable Rudolph Hargrave, Honorable Justice Alma Wilson, Honorable Yvonne Kauger, and Honorable Hardy Summers Justices of the Supreme Court for the State of Oklahoma, requiring, directing and commanding the said Honorable Marian P. Opala, Honorable Ralph B. Hodges, Honorable Robert E. Lavender, Honorable Robert D. Simms, Honorable Joseph M. Watt, Honorable Rudolph Hargrave, Honorable Justice Alma Wilson, Honorable Yvonne Kauger, and Honorable Hardy Summers to reverse the February 25, 1992, Order, in Case No. 78,759, set forth in Appendix A, *infra*, Petitioner's Exhibit No. 1, of the court below; the court below vacate the trial court Journal Entry of judgement, dated November 19, 1982, in the Oklahoma County District Court, State of Oklahoma case styled *Mothershed v. Mothershed*, case no. JFD-81-1918, including all proceedings thereon, and

remand this action to the trial court for a new trial and in support of this petition states:

I. Order and Opinion Below

The Order, in Case No. 78,759, dated February 25, 1992, in the court below, denying petitioner's Application to Assume Original Jurisdiction and Petition for Prerogative Writ to Vacate Judgment on grounds of Fraud on the Court is set forth in Appendix A, *infra*, Petitioner's Exhibit No. 1. There exists no official report of said Order, Appendix A, *infra*, Petitioner's Exhibit No. 1.

II. Jurisdiction

This Court has jurisdiction of this petition under 28 U.S.C. Sec. 1651(a), because it has jurisdiction over a final judgment in this suit under 28 U.S.C. Sec. 1291. This is an application for writ of mandamus to issue to the court below on the matters and issues herein is provided under Article III, Constitution of the United States, to review an Order of the court below denying petitioner's Application to Assume Original Jurisdiction and Petition for Prerogative Writ to Vacate Judgment on grounds of Fraud on the Court is set

forth in Appendix A, *infra*, Petitioner's Exhibit No. 1. Mandamus has been used at times to litigate constitutional issues. *Maurbury v. Madison*, 1 Cranch 137, 2 L.Ed. 137 (U.S. 1803); *Ex parte Peru*, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); Wolfson, *Extraordinary Writs in the Supreme Court Since* Ex Parte Peru, 51 Col. L. Rev. 977 (1951). With the decision of *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L.Ed. 97 (U.S. 1816) it became firmly established that the Supreme Court could reverse the highest court of a state when they had decided a federal constitutional issue. Said Order, Appendix A, *infra*, Petitioner's Exhibit No. 1, is a final order, *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946); only from the date of refusal of the highest court of a state to exercise discretionary power to review a judgment of a trial court did the latter judgment become final for review by this Court, *Andrews v. Virginia R. Co.*, 248 U.S. 272, 39 S.Ct. 101, 63 L.Ed. 236 (1919); petitioner has exhausted all state remedies *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 229, 61 S.Ct.643, 85 L.Ed. 91 (1941); and the state's highest court, the Oklahoma Supreme Court of the

State of Oklahoma, has failed to consider important state interests well suited for its consideration *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 47 L.Ed.2d 838 (1976).

Also, a permissive appeal of the matters and issues herein is provided under 28 U.S.C. Sec. 1257.

State court judgments are given the same preclusion effect in federal court as in state court *Migra v. Warren City School Board of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). However in the instant case, the court below dismissed petitioner's Application and Petition, see Original Record, without considering relevant uncontroverted or unrefuted judicial admissions of fact by respondent below. Petitioner, thus, had no opportunity to litigate the various factual issues constituting fraud on the trial court. If a party had no opportunity to litigate an issue, preclusion is improper under state as well as federal law and under due process standards *Liss v. Trans Auto Systems*, 68 N.Y.2d 15, 496 N.E.2d 851, 505 N.Y.S.2d 831 (1986), see generally Friedman, *Res Judicata and Collateral Estoppel*, (1988). Petitioner

attempted to assert rights under a Bill of Rights provision of a state constitution where it was guaranteed parties the administration of justice in state court proceedings shall be determined without sale, denial, delay or prejudice. When petitioner attempted to assert those state and federal constitutionally guaranteed rights the court below denied him any relief. "Whatever [traps] the state may set for those who are endeavoring to assert rights, when plainly and reasonably made is not to be defeated in the name of local practice." *Davis v. Webster*, 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143 (1923).

This is an application for a writ of mandamus to issue from this Court to the court below, which denied petitioner's Application to Assume Original Jurisdiction and Petition for Prerogative Writ to Vacate Judgment on grounds of Fraud on the Court [Application and Petition], see Original Record. Petitioner's Application and Petition draws in question the validity of Oklahoma Statutes Annotated (1991), Title 12, Sec. 1031(4) and 1038, *infra*, on the ground that the limitation statutes of said statutes is repugnant to Section 6, Article 2, Oklahoma Constitution, *infra*; the Equal Protection Clauses

and the Due Process Clauses of both the fifth amendment and fourteenth Amendment, United States Constitution, *infra*. The statutes denies the trial court jurisdiction to hear matters, essentially, sounding in fraud on the trial court, *e.g.* (1) in derogation of the state's constitutional provision that proceedings arising in state courts of law and equity "right and justice shall be administered without sale, denial, delay, or prejudice"; and (2) by conclusively presuming sale, denial, delay, or prejudice in the administration of right and justice in a state trial court will be discovered within the statutory two (2) year limitation period. The state constitutional guarantee to party litigants of the structural, substantive and procedural guarantee that proceedings in that state's courts of law and equity that "right and justice shall be administered without sale, denial, delay, or prejudice" become mandatory procedural and substantive due process of law protection for party litigants in state courts, under the fifth and fourteenth amendments of the United States Constitution, *infra*. "Where there is no ambiguity in the state statute, federal courts are not to abstain but must proceed to decide the federal constitu-

tional claim." Abstention should not be ordered merely to vindicate the claim in a state court *Wisconsin v. Consantineau*, 400 U.S. 433, 439, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971).

The federal constitutional question was timely raised by petitioner by Response to Respondent's Motion for Dismissal of Application and Petition, Dismissal of Oral hearing, Application for Injunction and Compensation for Costs and Damages see Original Record; and Supplemental Brief, see Original Record, pages 3, 4, 5, filed in the court below on February 11, 1992. Said Order, Appendix A, *infra*, page 1, denied petitioner's Application and Petition on February 25, 1992, without addressing the federal constitutional question.

III. Constitutional Provisions and Statutes Involved

1. The fifth amendment, United States Constitution, which provides: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or incitement of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service on time of War or public danger; nor shall any person be subject for the same offense to be twice be put in jeopardy of life or limb;

nor shall be compelled in a criminal case to be a witness against himself, nor deprived of life, liberty or property without due process of law;

nor shall private property be taken for public use, without just compensation."

2. The fourteenth amendment, United States Constitution, which provides: " All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the laws."

3. Section 6, Article 2, Oklahoma Constitution, which provides: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

4. Section 4, Article 7, Oklahoma Constitution, which

provides: "The appellate jurisdiction of the Supreme Court shall be coextensive with the State and shall extend to all cases at law and in equity; except that the Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases until otherwise provided by statute and in the event there is any conflict as to jurisdiction, the Supreme Court shall determine which court has jurisdiction and such determination shall be final. The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all Agencies, Commissions and Boards created by law. The Supreme Court, Court of Criminal Appeals, in criminal matters and all other appellate courts shall have power to issue writs of habeas corpus, mandamus quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law and may exercise such other and further jurisdiction as may be conferred by statute. Each of the Justices or Judges shall have power to issue writs returnable before himself, or before the Supreme Court, other Appellate Courts, or before any District Court, or judge thereof in the State. The appellate and original jurisdiction of the

Supreme Court and all other appellate courts shall be invoked in the manner provided by law."

5. The statutes under which petitioner was denied jurisdiction in the trial court, were Oklahoma Statutes Annotated (1991) Title 12, Sections 1031(4); and 1038, respectively, provide as follows:

Sec. 1031(4) "The district court shall have power to vacate or modify its own judgments or orders within the times prescribed hereafter: . . .(4), For fraud practiced on the court by the successful party, in obtaining the judgment or order." and Sec. 1038 "Proceedings to vacate or modify a judgment or order, for the causes mentioned in paragraph 4, 5, and 7 of Section 1031 of this Title must be commenced within two (2) years after the judgment was rendered or the order made, unless the party entitled thereto be an infant, or a person of unsound mind and then within two (2) years after removal of the disability."

6. A conflicting public policy is stated a statutory limitation after discovery of unpermitted conduct is contained in the in criminal provisions Oklahoma Statutes Annotated (1991), Title

22, Sec. 152, " Prosecutions for the crimes of *bribery*, embezzlement of public money, bonds, securities, assets or property of the state or any county, school district, municipality or other subdivision thereof, or any misappropriation of public money, bonds, securities, assets or property of the state or any county, school district, municipality or other subdivision thereof, and conspiracy to *defraud* the State of Oklahoma or any county, school district, municipality or other subdivision thereof in any manner or for any purpose shall be commenced within seven (7) years *after the discovery* of the crime;. . ."(emphasis counsel)

7. There is no jurisdictional time limitation for bringing a petition for a writ of mandamus.

IV. Existence of Jurisdiction Below

Jurisdiction of the court below over the subject matter herein arose from two (2) sources. The first source of subject matter jurisdiction is the superintending powers of the court below as provided in Okla. Const. Art. 7, Sec. 4, *supra*, to oversee the administration of justice and a judgment, supra, of inferior courts of the State of Oklahoma is free from sale,

denial of justice, delay and prejudice as guaranteed parties utilizing the offices of such inferior courts of the State of Oklahoma by Okla. Const. Art. 2, Sec. 6, *supra*. The second source of subject matter jurisdiction to hear this matter is the inherent equitable power of the court below in any case arising from any court within the State of Oklahoma to make inquiry whether the administration of justice in the proceedings and said judgment, had been obtained sale of justice, denial of justice, prejudice of justice or other unlawful means. The court below was the sole forum within the State of Oklahoma to hear the subject matter in issue as the trial court, has by reason of passage of time, lost all jurisdiction to make inquest and/or vacate the judgment, entered November 19, 1982, in said State district court, the trial court, pursuant to Okla. Stat. Anno.(1991) Title 12, Sec. 1031(4) and 1038, *supra*. The court below abused discretion in its February 25, 1992, Order, set forth in Appendix A, *infra*, Petitioner's Exhibit No. 1, when it denied petitioner's Application to Assume Original Jurisdiction and Petition for Prerogative Writ to Vacate Judgment on grounds of Fraud on the Court see

Original Record.

V. Statement of Facts

The facts necessary to an understanding of the issues presented by this application are as follows:

A. Nature of the Case.

This is an application for writ of mandamus to issue from this Court to the Justices of the Supreme Court of the State of Oklahoma to require, direct and command said Justices of said court below to reverse their February 25, 1992, Order, in Case No. 78,759, set forth in Appendix A, *infra*, Petitioner's Exhibit No. 1; the court below vacate the trial court Journal Entry of judgement, dated November 19, 1982, in the Oklahoma County District Court, State of Oklahoma case styled *Mothershed v. Mothershed*, case no. JFD-81-1918, including all proceedings thereon, and remand this action to the trial court for a new trial on grounds the court below abused discretion in failing to consider relevant factors and there was a clear error of judgment.

B. Context of the Ruling.

The context of the ruling of the court below is as follows:

Petitioner herein was petitioner in the court below on December 13, 1991, filed his Petition and Application, see Original Record, seeking issuance of a prerogative writ in equity in the nature of a civil information *Wilson v. State Water Supply Commission*, 84 N.J.Eq. 150, 93 A. 732, 733 (1915). Petitioner sought the writ of civil information from the court below to make inquest or investigation into the trial court Journal Entry of judgement, dated November 19, 1982, in the Oklahoma County District Court, State of Oklahoma case styled *Mothershed v. Mothershed*, case no. JFD-81-1918, to determine whether said trial court judgment had been obtained by the prevailing party and/or her privies by fraud or connivance. Application and Petition, see Original Record and Petitioner's Brief in Support of Application to Assume Original Jurisdiction and Petition for Prerogative Writ to Vacate Judgment on grounds of Fraud on the Court [Petitioner's Brief in Support], is set forth in Original Record, pp. 8-12, were drafted preemptive of good faith defenses, leaving only a possible dispute over issues of fact.

Petitioner's defenses in the court below were as follows: 1)

the doctrine of latches does not apply as defense for proceedings seeking relief from a judgment fraudulent obtained by prevailing party and/or her privies; 2) the plea of res judicata is not a valid defense to a proceeding to vacate a judgment obtained through fraud perpetrated on the trial court by prevailing party and/or her privies; 3) economic duress is a basis for avoiding mutual release and settlement of claims in a dispute where one party used the opposing party's precarious economic position to obtain favorable results; 4) wrongful or unlawful acts of a party and/or their privies resulting in involuntarily settlement of disputes with an opposing party are not confined to settlement negotiations in order for economic duress to be found as a valid basis for avoiding a mutual release and settlement agreement; 5) "voluntary" with reference to settlement agreements encompasses the exercise of choice between two or more courses of action, which party's deliberate choice can be negated by evidence of economic duress under which acquiescence to the settlement agreement was attained and money and other value was relinquished, are regarded by courts as voluntary acts and, thus, are reputable;

6) at common law a release obtained by trickery is treated as *void ab initio*, and 7) a release of future damages is *void ab initio* and may not be plead as a defense to an action.

As authority for the grant of the writ petitioner cited *Johnson v. Johnson*, 424 P.2d 414 (Okla. 1967), which the court below vacated a judgment which had been entered over twelve (12) years previously, where a Justice of the court below was found to have been bribed or sold justice, Petitioner's Brief in Support], is set forth in Original Record, pp.3-8. The sale of justice is conduct long deemed grounds to vacate a previous judgment as a fraud on the court. *Johnson v.Johnson*, *supra*, citing at page 420, *Universal Oil Products v. Root Refining Co.*, 238 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946). Petitioner sought to cause the court below to invoke its "inherent equitable power to grant relief in any case where corruption can be shown to have influenced a decision of this Court. We have inherent equitable power to protect the integrity of our judgments and this power includes the power to conduct inquiries as to whether a judgment has been obtained by corrupt means." *Ibid*, at page 420. The court

below has superintending powers over all courts within the state of Oklahoma provided in Okla. Const. Art. 7, Sec. 4, to oversee the administration of justice and a judgment, *supra*, as said State district court, the trial court, pursuant to Okla. Stat. Anno.(1991) Title 12, Sec. 1031(4) and 1038, *supra*, had lost jurisdiction over the action two (2) years after its entry. All parties accessing courts within the state of Oklahoma have rights, *i.e.* judicial proceedings are free from sale, denial of justice, delay and prejudice as guaranteed by Okla. Const. Art. 2, Sec. 6, *supra*. On February 11, 1992, petitioner filed in the court below his Supplemental Brief, see Original Record, pages 3, 4, 5, showing the rights guaranteed by Okla. Const. Art. 2, Sec. 6, *supra*, are procedural and substantive due process rights enforceable under the fifth and fourteenth amendments of the Constitution of the United States.

On December 17, 1991, the court below entered an order in Case No. 78,759, set forth in Appendix A, *infra*, Petitioner's Exhibit No. 2, requiring the respondent therein, an interested party herein, to respond no later than January 21, 1992.

On January 21, 1992, the respondent therein, an inter-

ested party herein, filed an unverified Motion for Dismissal of Action, Dismissal of Oral Hearing, Issuance of an Injunction and Compensation for Costs and Damages, see Original Record. Said respondent below did not file any answer or otherwise traverse petitioner's Application and Petition, see Original Record. Neither did said Motion for Dismissal of Action, Dismissal of Oral Hearing, Issuance of an Injunction and Compensation for Costs and Damages, see Original Record, contain any denials, either specific or general, nor did she refute or controvert averments in petitioner's said Application and Petition, see Original Record, but did in fact corroborated and substantiated with additional evidence in support of said petitioner's averments by judicial admissions of respondent's and/or her privies wrongdoing in the trial court. Respondent's Motion for Dismissal of Action, Dismissal of Oral Hearing, Issuance of an Injunction and Compensation for Costs and Damages [Motion], see Original Record, "(i) Set aside a 1982 divorce case property settlement Journal Entry of Judgment because the Honorable Judge Stewart Hunter and Conservator, William L. Peterson, Jr., were bribed." Said

petitioner further embellished petitioner's Application and Petition by adding as judicial admissions, Motion for Dismissal of Action, Dismissal of Oral Hearing, Issuance of an Injunction and Compensation for Costs and Damages, see Original Record, Addendum III, a report of respondent's and/or her privies conduct contained in a Oklahoma tabloid newspaper. Respondent affirmed the wrongful conduct of her's and/or her privies through judicial admissions contained in said Motion and factually confessed petitioner's Application and Petition, see Original Record. Respondent's Motion for Dismissal of Action, Dismissal of Oral Hearing, Issuance of an Injunction and Compensation for Costs and Damages, see Original Record is admissible in evidence in the court below. Authentication or identification of a document may be accomplished through evidence that a writing authorized by law to be recorded or filed and which is in fact recorded and filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept. Oklahoma Statutes Annotated (1991), Title 12, Section 2901(b)(7)[Oklahoma Evidence Code, Section

2901(b)(7), *i.d. Fed.R.Evid.* 901(b)(7)].

On January 24, 1992, the court below entered an order in Case No. 78,759, set forth in Appendix A, *infra*, Petitioner's Exhibit No. 3, found "Filings of respondent of January 21, 1992 [sic] shall be considered as a response with oral presentation remaining as heretofore scheduled."

On January 31, 1992, petitioner filed in the court below Petitioner's Response to Respondent's Motion for Dismissal of Application and Petition, Dismissal of Oral hearing, Application for Injunction and Compensation for Costs and Damages [Response], see Original Record, p. 2, para. B);C) and Supplemental Brief, see Original Record, p.1, demonstrating to the court below there was no basis in fact or law for respondent's said Motion. Petitioner annexed to his said Petitioner's Response to Respondent's Motion for Dismissal of Application and Petition, Dismissal of Oral hearing, Application for Injunction and Compensation for Costs and Damages [Response], see Original Record, is an affidavit of petitioner showing the court below there was merit in law and evidentiary fact in support of his Application and Petition. *Hazel-*

Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, at page 248, 64 S.Ct. 997, 88 L.Ed 1250, 61 U.S.P.Q. 241, rehearing denied 322 U.S. 1281, 88 L.Ed 1596 (1944); *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145, at page 147, 10 Fed.Rul.Serv.2d 1496 (7th Cir. 1966 Ill.); *certiorari denied* 385 U.S. 1003, 87 S.Ct. 707, 17 L.Ed.2d 542; *later appealed* 430 F.2d 85 (7th Cir.Ill), *certiorari denied* 401 U.S. 975, 91 S.Ct. 1193, 28 L.Ed.2d 324. No counter affidavits or other response was thereafter filed by respondent in the court below.

On February 11, 1992, petitioner filed in the court below his Supplemental Authority Brief, see Original Record, showing the court below that all facts averred in petitioners Application and Petition, see Original Record, had been judicially admitted by respondent for all purposes in said proceeding and as of said date said averred facts stood *pro confesso* by respondent.

> *"[A] party may* at any and all times *invoke the language of his opponent's pleading on that particular issue* as rendering certain facts *indisputable*, and that, in doing this, he is on the other hand neither required or allowed to *offer the pleading in evidence* in the ordinary manner, nor on the other had forbidden to comment in argument without having made a formal

offer; for he is merely advocating a construction of the infrajudical act of waiver of proof." 4 *Wigmore, Evidence*, Sec. 1064, p. 67 (Chadborn rev. 1972).

Ibid, Sec. 1065(3), p. 71, "A judicial admission is a waiver of proof (Sec. 1057 *supra*); and a pleading is, for the purpose of the very cause itself, a defining of the lines of controversy and a waiver of proof on all matters outside these lines of dispute."(emphasis in original)

"The vital feature of a judicial admission is universally conceded to be its *conclusiveness* upon the party making it, i.e., the prohibition of any further dispute of the fact by him and of any use of evidence to disprove or contradict it." 9 *Wigmore, Evidence*, Sec. 2590, p. 822 (Chadborn rev. 1981).(emphasis in original).

A fact that is judicially admitted *needs* no evidence from a party benefiting by the admission." *Ibid* Sec. 2591, p. 824.(emphasis in original).

In petitioner's Supplemental Brief, see Original Record, page 17, filed the court below stated that all facts averred in petitioners Application and Petition, see Original Record, had been admitted by respondent for all purposes in said proceeding, see *Wigmore Evidence, supra*, and an inquest or inquiry pursuant to a prerogative writ of civil inquest to issue from the court below into whether respondent and/or her privies had practiced fraud on the trial court, the Oklahoma County

District Court, State of Oklahoma case styled *Mothershed v. Mothershed*, Case No. JFD-81-1918, was no longer the relief petitioner sought from the court below. But petitioner thereafter requested relief from the superintending court below under the extraordinary remedies of, either, *audita querela, coram nobis (or vobis)*, bill of review or bill in the nature of a bill of review to vacate said trial court Journal Entry of judgment. On February 11, 1992, petitioner, together with respondent's judicial admissions had facts in evidence to prove a *prima facie* case for the court below for grant to petitioner a prerogative writ of either *audita querela, coram nobis (or vobis)*, bill of review or bill in the nature of a bill of review to vacate said trial court Journal Entry of judgment of November 19, 1982, and remand the action to the trial court for a new trial.

Oral arguments were heard in the court below before the Honorable Referee Wayne Snow on Wednesday, February 12, 1992, at 1:30 p.m. o'clock, local time. No evidentiary hearing was held.

The court below by Order, in Case No. 78,759, dated

February 25, 1992, denied petitioner's Application to Assume Original Jurisdiction and Petition for Prerogative Writ to Vacate Judgment on grounds of Fraud on the Court is set forth in Appendix A, *infra*, Petitioner's Exhibit No. 1, "Application to assume original jurisdiction to entertain petition to vacate judgment denied; request for sanctions denied."

C. Prior Proceedings.

Petitioner and respondent in the court below were married seventeen years prior to divorce proceedings being initiated by petitioner in Oklahoma County District Court in Case No. JFD-81-1487, on February 25, 1981. Respondent in the case below eluded service of process and subsequently on March 13, 1981, brought a separate divorce action in Oklahoma County District Court in JFD-8l-1918, before her long time friend and co-hobby enthusiast District Judge Stewart M. Hunter. Petitioner entered a general appearance, on March 27, 1981, and moved to consolidate the proceeding with the divorce proceeding he had previously filed. Contrary to local court rule trial judge Stewart M. Hunter wrested the divorce proceeding from the previously assigned trial judge. There-

after, said Judge Stewart M. Hunter's trial proceedings was highlighted by numerous and ongoing judicial anomalies in trial court conduct that would shock anyone's sensibilities of fair play and substantial justice. Such judicial anomalies were all directed to petitioner [defendant in the trial court]. From a retrospect of the January 21, 1992, judicial admissions of respondent below, the judicial anomalies were motivated by personal pecuniary interest of the trial court. This self interest by motivation of pecuniary interest was not limited to the trial judge, Judge Stewart M. Hunter, but included the trial court appointed conservator, William L. Peterson, Jr. The sale of the administration of justice is more fully documented in section IX. see Original Record. It may be reasonably be inferred from the evidence that the trial judge Stewart M. Hunter received approximately $150,000 in value, either money and/or property. The conservator, William L. Peterson, Jr., received approximately $980,000 in value, either money and/or property. Also, the reasonable inference is the two said members of the trial court received the said money and/or property for their sale of the administration of justice

for the benefit of the plaintiff [respondent in the court below], which is a fraud on the trial court.

D. History of trial court excessive use of judicial power.

Between the years 1978 through 1980, there are six (6) officially reported cases where prerogative writs issued from the court below to Judge Stewart M. Hunter in the trial court, checking his excessive use of judicial power and are as follows:

Grubb v. Hunter, 573 P.2d 699 (Okl. 1978), where the court below assumed original jurisdiction and issued writ of prohibition to the trial court in a divorce action.

Merrit v. Hunter, 575 P.2d 623, at page 624 (Okl. 1978), where the court below assumed original jurisdiction and issued a writ of mandamus to the trial court in a divorce proceeding Judge Stewart M. Hunter's conduct was found to be "of such a nature to cause doubt as to his partiality, bias or prejudice."

State v. Hunter, 580 P.2d 158 (Okl. 1978), where the court below assumed original jurisdiction and granted a writ of prohibition to the trial court in a post conviction criminal proceeding violated prisoner's Fourteenth Amendment Constitutional rights.

Continental Tel. Co. of Oklahoma v. Hunter, 590 P.2d 667 (Okl. 1979), the court below assumed original jurisdiction and issued a writ of prohibition to the trial court, prohibiting Judge Stewart M. Hunter from further action in a proceeding before him which was within the exclusive jurisdiction of a constitutionally created administrative agency, the Corporation Commission.

Sabouri v. Hunter, 596 P.2d 891, at page 893 (Okl. 1979), the court below assumed original jurisdiction and issued a writ of prohibition in a civil action where the trial judge denied Fourth and Fourteenth Amendment guaranteed rights, saying "[W]e must hold that the trial court's action is repugnant to the Constitution and an exercise of excessive use of power which justifies the issuance of a Writ of Prohibition."

Oklahoma County Sheriff v. Hunter, 615 P.2d 1007 (Okl. 1980), the court below assumed original jurisdiction and issued a writ of prohibition to the trial court in a pre-trial discovery proceeding where the judge had ordered witnesses to testify in violation of Fifth Amendment Constitutional right against self incrimination.

VI. Standard for Review

The standard of review for a proceeding to vacate a judgment is whether the court below abused its discretion in its ruling. *Brouder v. Director, Dept. of Corrections*, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521, 24 Fed.R.Serv.2d 749, *rehearing denied* 434 U.S. 1089, 98 S.Ct. 1286, 55 L.Ed.2d 795 (1978). The reviewing court must consider whether the decision of the lower court "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overland Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971).

VII. Reasons for Granting the Writ

The reasons the writ requested herein should issue are as follows:

POINT I

NOT ONLY, THE COURT BELOW ABUSED DISCRETION IN DENYING PETITIONER RELIEF, BUT THE COURT BELOW HAD AN AFFIRMATIVE DUTY UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES TO VACATE A JUDGMENT WHERE THERE WAS JUDICIAL ADMISSION OF FACT OF FRAUD PRACTICED UPON

THE TRIAL COURT BY OPPOSING PARTY.

The court below on February 25, 1992, in its Order, Appendix A, *infra*, Petitioner's Exhibit No. 1, failed to assume original jurisdiction and issue a prerogative writ to vacate a trial court judgment entered over nine years previously but newly discovered through judicial admission of facts contained in documents filed by respondent in the court below on January 21, 1992, see *Wigmore, Evidence, supra*. The judicial admission of facts was respondent and/or her privies had practiced fraud on a certain trial court in obtaining a judgment dated November 19, 1982, through the sale of justice by the trial court judiciary, i.e., the trial judge and the trial court appointed conservator, Motion for Dismissal of Action, Dismissal of Oral Hearing, Issuance of an Injunction and Compensation for Costs and Damages, see Original Record, page 1, "(1) Set aside a 1982 divorce case property settlement Journal Entry of Judgment because the Honorable Judge Stewart Hunter and Conservator, William L. Peterson, Jr., were bribed ".

Fraud by officers of the court, or by the court itself has

long been recognized as a ground for relief, *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed 1447, *rehearing denied* 329 U.S. 823, 67 S.Ct 24, 91 L.Ed 700 (1946); *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514 (3rd Cir.1948 Del.), *certiorari denied* 335 U.S. 912, 69 S.Ct. 481, 93 L.Ed 444, *rehearing denied* 336 U.S. 915, 69 S.Ct. 601, 93 L.Ed 1079 (1949), cited in *Johnson v. Johnson*, *supra*, at page 420.

Annexed to his Response, see Original Record, filed in the court below on January 31, 1992, is an affidavit of petitioner showing the court below there was merit in law and evidentiary fact in support of his proceeding to vacate a judgment procured by prevailing party through fraud on trial court averred in Application and Petition. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, at page 248, 64 S.Ct. 997, 88 L.Ed 1250, 61 U.S.P.Q. 241, rehearing denied 322 U.S. 1281, 88 L.Ed 1596 (1944); *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145, at page 147, 10 Fed.Rul.Serv.2d 1496 (7th Cir. 1966 Ill.); *certiorari denied* 385 U.S. 1003, 87 S.Ct. 707, 17 L.Ed.2d 542; *later appealed* 430 F.2d 85 (7th Cir.Ill), *certiorari*

denied 401 U.S. 975, 91 S.Ct. 1193, 28 L.Ed.2d 324. Respondent below did not file any further documents with the court below or counter affidavits.

"It has been held, for example, that although a judge has power to set aside a judgment obtained by fraud on the court, see *Kupferman v. Consolidated Research & Manufacturing Corp.*, 459 F.2d 1072, 1078, 19 A.L.R. Fed 747, 754-755 (2nd Cir. 1972 N.Y.), this power should be rarely exercised on the basis of affidavits alone, without giving the parties the opportunity to be heard. *Universal Oil Products v. Root Refining Co.*, 328 U.S. 575, 580, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946)." *Jackson v. Irving Trust Co.*, 311 U.S. 494, 499, 61 S.Ct.326, 85 L.Ed. 297 (1941), see *Israel Aircraft Ind., Ltd. v. Standard Precision*, 559 F.2d 203, at page 207 (2nd Cir. 1977 N.Y.). A question of due process may arise if a motion to vacate as a result of fraud on the court is dismissed *sua sponte* without an evidentiary hearing. See *Societe Internationale v. Rogers*, 357 U.S. 197, at page 209, 78 S.Ct 1087, 2 L.Ed.2d 1255 (1958).

However, in a proceeding to vacate a trial court judgment

where facts were conclusively evidenced by waiver of proof contained by judicial admitted *prima facie* case of said judgment being procured by the prevailing party and/or her privies of fraud practiced on the trial court, through the sale of the administration of justice, no evidentiary hearing is required under the due process clause. The trial court or the reviewing court should proceed to vacate such fraudulently procured judgment.

A state board consisting of optometrist, which regulated the profession and practice of optometry it was found to be Constitutionally disqualified by personal benefit from hearing charges against other optometrist and to have denied due process of law, "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." Gibson v. Berryhill, 411 U.S. 564, at page 579, 93 S.Ct. 1689, 36 L.Ed.2d 488, at page 500 (1973).

"Concededly a 'fair trial in a fair tribunal is a basic requirement of due process,' *In re Murchinson, 349 U.S. 133, 136, 93 S.Ct. 623, 99 L.Ed 942 (1955)."* Whithrow v. Larkin, 421 U.S.

35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). *Ibid*, 421 U.S. at page 47, "Not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent the probability of unfairness (citations omitted). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or the decision maker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome. and which he has been target of personal abuse or criticism from the party before him."

Ibid, 421 U.S. at page 53, "This Court found the procedure of a denial of due process of law not only because the judge in effect became part of the prosecution and assumed an adversary position, but also because as a judge, passing on guilt or innocence, he very likely relied on his own personal knowledge and impression of what had occurred in the grand jury room, an impression that could not be tested by adequate cross-examination."

In the proceeding in the court below, respondent therein

judicially admitted two (2) members of the trial judiciary were bribed resulting in the trial court rendering a judgement in favor of plaintiff [respondent below] over nine (9) years earlier. While this Court has ruled in *Universal Oil Products v. Root Refining Co.*, *supra*, and the court below in *Johnson v. Johnson*, *supra*, have found the sale of the administration of justice in a judicial proceeding, under the historic inherent equitable power of both this Court and the court below, to be voidable under traditional procedural rules of the court. This Court has not previously ruled on the issue of whether the sale of the administration of justice in a judicial proceeding violates fundamental fairness and substantial justice as guaranteed under the Fifth Amendment and Fourteenth Amendment of the Constitution.

This Court has ruled in *Gibson v. Berryhill*, *supra*, has found a possible remote pecuniary interest of an adjudicator in an administrative proceeding to be sufficient to violate due process of law.

Petitioner proposes this Court extend the coverage of protected rights under the Fifth and Fourteenth Amendment

of the United States Constitution to include the following: The failure of a court to vacate a judicially admitted after discovered fraud on the trial court by the prevailing party and/or their privies, is not only abuse of discretion of said court, but said court or a reviewing court has an affirmative duty under the Fifth and Fourteenth Amendment of the United States Constitution to vacate such a judgment, where the administration of justice has been found to be sold by said trial court.

POINT II

THE COURT BELOW ABUSED DISCRETION WHERE IT FAILED TO EVEN CONSIDER APPLICABLE FACTS, *e.g.* JUDICIAL ADMISSIONS OF FRAUD PRACTICED ON THE TRIAL COURT BY A PREVAILING PARTY AND/OR HER PRIVIES THROUGH THE SALE OF THE ADMINISTRATION OF JUSTICE BY THE TRIAL COURT.

The court below in its February 25, 1992, Order, Appendix A, *infra*, Petitioner's Exhibit No. 1, "Application to assume original jurisdiction to entertain petition to vacate judgment denied; request for sanctions denied.", the court below failed to even consider newly discovered through judicial admission of facts contained in documents filed by respondent in the court below on January 21, 1992, see Wigmore, Evidence, *supra*. The judicial admission of facts was respondent and/or

her privies had practiced fraud on a certain trial court in obtaining a judgment dated November 19, 1982, through the sale of justice by the trial court judiciary, i.e., the trial judge and the trial court appointed conservator, Motion for Dismissal of Action, Dismissal of Oral Hearing, Issuance of an Injunction and Compensation for Costs and Damages, see Original Record, p. 1, "(1) Set aside a 1982 divorce case property settlement Journal Entry of Judgment because the Honorable Judge Stewart Hunter and Conservator, William L. Peterson, Jr., were bribed".

Affidavits by persons willing to testify are adequate evidence in a proceeding to vacate a judgment procured by fraud practiced on the trial court by a prevailing party and/or her privies. Hazel-Atlas, *supra*, 322 U.S., at page 248; Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, at page 147, 10 Fed.Rul.Serv.2d 1496 (7th Cir. 1966 Ill.); *certiorari denied* 385 U.S. 1003, 87 S.Ct. 707, 17 L.Ed.2d 542; *later appealed* 430 F.2d 85 (7th Cir.Ill), *certiorari denied* 401 U.S. 975, 91 S.Ct. 1193, 28 L.Ed.2d 324. An appeal averring fraud on the trial court may be decided upon its merits on the basis

of affidavits alone, and the appellate court vacate the judgment entered in the trial court and remand the matter for a new trial. *Israel v. Standard Precision*, *supra*, at page 209.

Where there are no fact findings by the court below it may fairly be assumed that court did not even consider applicable facts upon which it based its decision in its Order, February 25, 1992, Appendix A, *infra*, Petitioner's Exhibit No. 1.

> "The district court is vested with a great deal of discretion in its decision to grant or deny a Rule 60(b) motion. (citation omitted). . . A clear example of abuse of discretion is where a trial court fails to even consider either an applicable legal standard or the facts upon which the exercise of its discretionary judgment is based." *Summers v. State of Utah*, 927 F.2d 1165, 1168, 19 Fed.Rul.Serv.3d 751 (10th Cir.1991 Ut.).

The court below by Order, in Case No. 78,759, dated February 25, 1992, denied petitioner's Application to Assume Original Jurisdiction and Petition for Prerogative Writ to Vacate Judgment on grounds of Fraud on the Court is set forth in Appendix A, *infra*, Petitioner's Exhibit No. 1, appeared to even consider the judicial admission of facts which was respondent and/or her privies had practiced fraud on a certain trial court in obtaining a judgment dated November 19, 1982, through the sale of justice by the trial court judiciary, i.e., the

trial judge and the trial court appointed conservator, Motion for Dismissal of Action, Dismissal of Oral Hearing, Issuance of an Injunction and Compensation for Costs and Damages, see Original Record, p. 1, "(1) Set aside a 1982 divorce case property settlement Journal Entry of Judgment because the Honorable Judge Stewart Hunter and Conservator, William L. Peterson, Jr., were bribed ". Thus, the court below abused discretion when it appears to have failed to even consider facts upon which its discretionary judgment is based, which judicial admissions are conclusive evidence that respondent below and/or her privies had practiced fraud on the trial court through the sale of the administration of justice.

State courts must provide litigants claiming a denial of their rights under the United States Constitution a reasonable opportunity to be heard. Failure to do so is a violation of due process of law in the Fourteenth Amendment. *Brinkerhoff-Farris Trust & Savings v. Hill*, 281 U.S. 673, at page 678, 50 S.Ct. 451, 74 L.Ed. 1107, at page 1112 (1930); *Reece v. Georgia*, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77, *rehearing denied* 350 U.S. 943, 76 S.Ct. 292, 100 L.Ed. 822 (1955).

The Supreme Court has referred to "the right to be heard" as "one of the most fundamental requisites of due process" *Schroeder v. New York City*, 371 U.S. 208, at page 211, 83 S.Ct. 279, 9 L.Ed.2d 255, at page 259, 89 A.L.R.2d 1398 (1962). Again, it has stated: "A fundamental requirement of due process is the opportunity to be heard" *Armstrong v. Manzo*, 380 U.S. 545, at page 552, 85 S.Ct. 1187, 14 L.Ed. 2d 62, 66 (1965).

"[T]he right to present evidence is, of course, essential to the fair hearing required by the due process clause." *Jenkins v. McKeithen*, 395 U.S. 411, at page 429, 89 S.Ct. 1843, 23 L.Ed.2d 404, *rehearing denied*, 396 U.S. 869, 90 S.Ct. 35, 24 L.Ed.2d 123 (1969).

It is not possible to have a fair hearing where unrefuted evidence is introduced by a party; the opposing party judicially admitted and corroborated said evidence but the reviewing court or the trial court failed, neglected or refused to even consider such or make evidentiary finding of fact, such failure, neglect and/or refusal is a *de facto* denial of a fair hearing as assured parties litigants under the Equal Protection and Due

Process provisions of the Fifth and Fourteenth Amendments to the Constitution. Petitioner urges this Court to extend rights guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States to include, failure the court below to even consider applicable facts is a denial of due process of law. Such failure to even consider applicable facts is analogous to denial of a fair hearing, when all facts have been judicially admitted by the opposing party.

POINT III

THE COURT BELOW ABUSED DISCRETION WHERE IT FAILED TO EVEN CONSIDER APPLICABLE LAW.

The court below in its February 25, 1992, Order, Appendix A, *infra*, Petitioner's Exhibit No. 1, "Application to assume original jurisdiction to entertain petition to vacate judgment denied; request for sanctions denied.", the court below failed to even consider applicable law. The court below abused discretion when it failed to even consider applicable law, see Original Record, petitioner's Brief; petitioner's Response; and petitioner's Supplemental Authority for Application to Assume Original Jurisdiction and Petition for Prerogative Writ to

Vacate Judgment on Grounds of Fraud on the Court,

see *Summers v. State of Utah*, *supra*, at page 1168.

Petitioner's (in the court below) Brief, pages 2-12, see Original Record, sets forth applicable law for the court below as follows:

STATE STATUTES VOID UNDER STATE CONSTITUTION.

Oklahoma Statutes Annotated (1991), Title 12, Sec. 1031(4), and 1038, *supra*, the statutes denies the trial court jurisdiction to hear matters, essentially, sounding in fraud on the trial court, *e.g.* (1) in derogation of the state's constitutional provision that proceedings arising in state courts of law and equity "right and justice shall be administered without sale, denial, delay, or prejudice", Section 4, Article 7, Oklahoma Constitution; and (2) by conclusively presuming sale, denial, delay, or prejudice in the administration of right and justice in a state trial court will be discovered within the statutory two (2) year limitation period.

"Where a statute is in conflict with the constitution, and the courts must adjudge and thereby give effect of the constitution and void the statute." *Maurbury v. Madison*, 1 Cranch 137, at

page 178, 2 L.Ed. 137 (U.S. 1803).

The court below under the doctrine of inherent equitable power of the court as announced by *Johnson v. Johnson*, *supra*, at page 420, may at any time grant relief in any case where corruption can be shown to have influenced a decision of said court. *Johnson v. Johnson*, *supra*, at page 420, "We have inherent equitable power to protect the integrity of our judgments and this power includes the power to conduct inquiries as to whether a judgment has been obtained by corrupt means. (citation omitted) The only limitation on our power is that the investigation once it commenced, the rights of all the parties affected must be safeguarded by practices ordinarily observed in adversary proceedings."

Oklahoma Statutes Annotated (1991), Title 12, Sec. 1031(4), and 1038, *supra*, the statutes are, also, at war with the public policy contained the criminal limitation of actions statute in Oklahoma Statutes Annotated (1991), Title 22, Sec. 152, where in crimes of bribery and conspiracy to defraud have a limitation period for prosecution of such crimes commences "after discovery of the crime. Harmony and consistence are

positive values in a legal system because they serve the interests of impartiality and minimize arbitrariness. Comparing statutes by reference to others advances those values. In fact courts have been said to be under a duty to construe statutes harmoniously whenever they can be done *In re Bomgardner*, 711 P.2d 92, at page 94 (Okl. 1986).

The court below should have construed the statutes, Oklahoma Statutes Annotated (1991), Title 12, Sec. 1031(4), and 1038, *supra*, the statutes in harmony and constituency with public policy stated Oklahoma Statutes Annotated (1991), Title 22, Sec. 152, and implied that the civil limitation statutes commenced "after discovery" of the fraud practiced by the prevailing party and/or her privies on the court where the civil judgment was entered. In 1967, when substantially the same state civil limitation on vacating previously entered judgments was in effect, it was "after discovery" impliedly construed in said statutes when the court below vacated a judgment, entered twelve (12) years previously, which had been procured by fraud practiced on the court below, i.e., sale of the administration of justice by a member of the court

below *Johnson v. Johnson*, *supra*.

Oklahoma Statutes Annotated (1991), Title 12, Sec. 1031(4) and 1038, are restraints upon access to the trial courts within the state of Oklahoma, where fraud has been found to have been practiced upon the trial court two (2) years after entry of a judgment. This contravenes Section 6, Article 2, Oklahoma Constitution, which guarantees judicial proceedings "shall be administered without sale, denial, delay or prejudice.' The statutory provisions *ibid*, Sec. 1031(4) and 1038 conclusively presumes sale, denial, delay or prejudice in the state trial court will in fact be discovered within the two (2) year limitation period. Said statutory presumption is arbitrary, unequal and oppressive as to shock the sense of fairness as assured state court litigants, particularly court frauds of the sale of justice, under the Fourteenth Amendment of the Constitution. Said state statutory restraints upon access to the courts will be invalidated when so "arbitrary, unequal and oppressive" as to "shock the sense of fairness the Fourteenth Amendment was intended to satisfy." *Chicago & N. W. R. Co. v. Nye Schneider Fowler Co.*, 260 U.S. 35, 43 S.Ct. 55, 67 L.Ed.

115, 123 (1922).

FRAUD OR MISREPRESENTATION ON THE COURT TAKES MANY FORMS: 1) CORRUPTION OF A JUDGE BY AN ADVERSARY AND/OR THEIR PRIVIES; AND

The court below on February 25, 1992, in its Order, Appendix A, *infra*, Petitioner's Exhibit No. 1, failed to assume original jurisdiction and issue a prerogative writ to vacate a trial court judgment entered over nine years previously but newly discovered through judicial admission of facts contained in documents filed by respondent in the court below on January 21, 1992, see *Wigmore, Evidence*, *supra*. The judicial admission of facts was respondent and/or her privies had practiced fraud on a certain trial court in obtaining a judgment dated November 19, 1982, through the sale of justice by the trial court judiciary, i.e., the trial judge and the trial court appointed conservator, Motion for Dismissal of Action, Dismissal of Oral Hearing, Issuance of an Injunction and Compensation for Costs and Damages, see Original Record page 1, "(1) Set aside a 1982 divorce case property settlement Journal Entry of Judgment because the Honorable Judge

Stewart Hunter and Conservator, William L. Peterson, Jr., were bribed ".

Johnson v. Johnson, *supra*; *Universal Oil Products Co. v. Root Refining Co.*, *supra*, and *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514 (3rd Cir. 1948 Del.), *certiorari denied* 335 U.S. 912, 69 S.Ct. 481, 93 L.Ed 444, *rehearing denied* 336 U.S. 915, 69 S.Ct. 601, 93 L.Ed 1079 (1949) all have vacated judgments which had been obtained by a party and/or their privies practicing fraud on the trial court through sale of the administration of justice.

2) COLLUSION WITH A JUDGE BY AN ADVERSE PARTY AND/OR THEIR PRIVIES.

Respondent and/or her privies in the trial court had obtained, by actual count, over thirty (30) *ex parte* orders from the trial court see Original Record, Application and Petition, Appendix II, Abstract of Pleadings. Said Abstract of Pleadings was prepared from of original record trial court pleadings, motions and other papers filed therein [Trial Record = T.R.], summarizing 723 pages of documents filed from March 13, 1981, through November 27, 1982. Among the *ex parte* orders

was the following:

1) T.R. 153, filed October 20, 1982, *ex parte* order temporarily restraining Defendant (petitioner herein) and his attorneys from preparing for trial on the issues, however said order was never vacated or modified.

2) T.R. 259, filed April 19, 1982, *ex parte* order on Pre Trial Conference, attended by trial judge, plaintiff (respondent below) and her attorney, without prior notice to petitioner herein.

3) T.R. 463, filed August 19, 1982, *ex parte* order, summary incarceration of petitioner (defendant in the trial court) in Oklahoma County Jail, $50,000 appearance bond set. The court below on August 20, 1982, denied petitioner's writ of *habeas corpus* in Case No. 58,984.

4) T.R. 690-696, filed November 24, 1982, *ex parte* final account of Conservator.

5) T.R. 697-711, November 24, 1982, *ex parte* order to sell homestead.

6) T.R. 717, filed November 24, 1982, *ex parte* order authorizing payment of expenses of plaintiff(respondent in the

court below).

7) T.R. 717, filed November 24, 1982, *ex parte* order prohibiting parties further contact with conservator.

The above listing is not inclusive of the *ex parte* orders issued by the trial court Judge Stewart M. Hunter, but to demonstrate to this Court the pervasive nature of the collusion and the consequences of said collusion upon petitioner herein and the benefits attained by plaintiff (respondent in the court below).

The court below abused its discretion where it failed to even consider applicable legal standard as referred to by petitioner below, see Original Record, Response, page 2, "B) Petitioner's Application had been specifically drafted where Respondent's good faith legal and equitable defenses were preempted. Petitioner had drafted another response in anticipation Respondent may have been able to retain a licensed attorney who may have risked filing a bad faith response to Petitioner's Application.

C) Respondent has not denied or controverted any facts stated in Petitioner's Application. Respondent appears to

have, in fact, confessed and/or corroborated many facts stated in Petitioner's Application. Petitioner's Application has merit in fact and law. Petitioner has included clear and convincing evidence in support of his Application. Petitioner herewith files an affidavit in support of his Application to show this Court this Application has merit in fact and law; and that Petitioner in filing this Application is acting without improper motivation see *Okla. Stat. Anno.(1991) Title 12, Section 2011.* An affidavit in support of an motion to vacate a judgment on grounds of fraud on the court by a material witness is adequate evidence. see *Peacock Records, Inc. v. Checker Records, Inc.*, (Cir. 7, 1966 Ill.) 365 F.2d 1496, certiorari denied 385 U.S. 1003, 87 S.Ct. 707, 17 L.Ed.2d 542, later appealed (Cir. 7, Ill.) 430 F.2d 85, certiorari denied 401 U.S. 975, 91 S.Ct. 1193, 28 L.Ed.2d 1193.

C) There is no time limitations to setting aside a judgment on grounds of fraud on the court. see *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, (1944) 322 U.S. 238, 246, 64 S.Ct. 1176, 1179, 88 L.Ed. 1250, *Valerio v. Boise Cascade Corp.*, (D.C.Cal., 1978) 80 F.R.D. 626, 640 note 10, (Cir. 9th 1981) 645 F.2d 699,

certiorari denied 454 U.S. 1126, 102 S.Ct. 976, 71 L.Ed.2d 113, *Wilkin v. Sunbeam Corp.*, (Cir. 10, 1972 Kan.) 466 F.2d 714, 175 U.S.P.Q. 139, 16 Fed.Rul. Serv 2d 606, certiorari denied (1973) 409 U.S. 1126, 93 S.Ct. 940, 35 L.Ed.2d 259, 176 U.S.P.Q. 193, *Mallonee v Grow*, (Alas. 1972) 502 P.2d 432, 437, *Lockwood v. Bowles*, (DC.DC. 1969) 46 F.R.D. 625, 634, 13 Fed.Rul.Serv.2d 1299, *Dausuel v. Dausuel*, (1952) 90 App. D.C. 275, 195 F.2d 774, 19 A.L.R. FED 761, 7 Moore, *Federal Practice*, 2d ed. 1991, para 60.23. . .

E) This Court has inherent power to set aside a judgment obtained as a result of fraud on the court *Johnson v. Johnson*, 424 P.2d 414 (Okl. 1967). . . ."

The court below abused its discretion where it failed to even consider applicable legal standard as referred to by petitioner below, see Original Record, Supplemental Authority. State courts share with federal courts an obligation to "guard, enforce and protect every right granted or secured by the Constitution of the United States" *Robb v. Connolly*, 111 U.S. 624, 637, 4 S.Ct. 544, 28 L.Ed. 544 (1883). While it is abuse of discretion for a court to fail to even consider applicable legal

standards Summers v. State of Utah, *supra*, at page 1168. A party cannot have possibly have had a fair hearing as guaranteed under the due process clause of the Fifth and Fourteenth Amendments of the Constitution where unrefuted evidence is introduced by a party; the opposing party judicially admits the evidence but failed to apply applicable legal standards. Such failure to apply applicable legal standards is a *de facto* denial of a fair hearing as assured all party litigants under the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the Constitution.

VIII. Issues Presented to this Court

The issues presented herein are as follows:

1. Did the court below not only abuse discretion in denying petitioner relief, but did the court below have an affirmative duty under the equal protection and due process clauses of the Fifth and Fourteenth Amendments to the Constitution to vacate a judgment procured by prevailing party where there was judicial admission of fact of fraud practiced on the trial court, through sale of the administration of justice, by opposing party and/or their privies?

2. Did the court below not only abuse discretion where it

failed to even consider applicable facts, but was such failure a *de facto* denial of a fair hearing as assured all litigants under the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the Constitution?

3. Did the court below not only abuse discretion where it failed to even consider applicable legal standards, but was such failure a *de facto* denial of a fair hearing as assured all litigants under the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the Constitution?

IX. Exhibits

The statement of facts of prior proceedings are abstracted herein. Facts, which were judicially admitted by respondent in the court below, are fully set fourth in petitioner's Application and Petition, pages 6-22, see Original Record, FACTS, which, also, include Appendix I and Appendix II thereto annexed and are adopted herein *in totidem verbis.*

See Original Record which contain exhibits which are incorporated by reference herein are petitioner's Application and Petition, which may be essential to an understanding to the matters set forth in petition, as follows:

Application and Petition, Original Record, Page 13,

beginning line 13, "During the pendency of the said divorce action, Andrew M. Coats, attorney, Oklahoma City, who represented Plaintiff's father during the course of the proceeding. Petitioner is informed and believes on about the month of June, July or August, 1982, in a conference in Judge Stewart M. Hunter's office received a check in the amount of $500 directly handed and received from said Andrew M. Coats. At the very least this is a breach of legal ethics and judicial ethics, and quite possibly a bribe of the Judge."

This Court may take judicial notice that the same said Andrew M. Coats is one and the same person who is the current President of the Oklahoma Bar Association. Oklahoma Statutes Annotated (1991), Title 12, Sec. 2202(d) [i.d. Fed.R.Evid. 201(d)].

Application and Petition, Original Record, page 15, beginning line 4, "Petitioner [petitioner herein] is further informed and believes that James W."Bill" Berry, Plaintiff's attorney, on or about November 12, 1982, paid for hall rental, band, food, and liquid refreshment at a 'retirement party' for Judge Stewart M. Hunter. Judge Stewart M. Hunter was elected unopposed to the Oklahoma Court of Appeals and after

December 1982, was no longer a trial judge in Oklahoma County District Court. This is at the very least a breach of legal ethics and judicial ethics, and quite possibly a bribe of the Judge."

Application and Petition, Original Record, Page 15, beginning line 12, "On December 28, 1982, at a Board of Directors Meeting of Post Oak Oil Company as shown by the minutes of said meeting, attached hereto and made a part hereof and marked Petitioner's Exhibit No. 14, page 4, shows the corporate authorization of the payment of the sum of $45,000 to William L. Peterson, Jr., Conservator.

On February 4, 1983, after hearing before the trial court said William L. Peterson, Jr., was ordered reinstated as Conservator where he serves to this day, see Petitioner's Exhibit No. 14 and Petitioner's Exhibit No. 25, where his appointment was affirmed by this Court."

Application and Petition, Original Record, beginning Page 15, line 22, "Defendant [petitioner herein] has learned subsequent to November 19,1982, date of entry of the Journal Entry of judgment (T.R.645-681) Petitioner's Exhibit No. 1, in the divorce proceedings, said William L. Peterson, Jr., as Conserva-

tor, not only was prejudiced and biased against Defendant and partisan in favor of Plaintiff, but his position as Conservator was obligated and compromised because of his individual and personal borrowing of funds from Southwestern Bank & Trust Company, a banking institution controlled by Plaintiff's father, Jack H. Abernathy. During the course of the herein divorce proceedings and beginning on or about April, 1982, said William L. Peterson, Jr., started for his own personal and private business purposes borrowing sums of money from Southwestern Bank & Trust Company, [a banking institution is has as controlling owner Jack H. Abernathy, father of respondent below and plaintiff in the trial court] as reflected by UCC filings of loan security agreements with the office of County Clerk, Oklahoma City, Oklahoma County, State of Oklahoma. These borrowing continued as shown in *Southwestern Bank & Trust Company, Plaintiff, v. Burton E. Smith and J. Kirk Ashford, Defendants*, (U.S.D.C., West. Dist. Okla, 1984, Case No. CIV-84-1561-T), Complaint filed June 22, 1984, a copy of which is attached hereto and marked Petitioner's Exhibit No. 19, which is a suit to recover money from the guarantors but not the underlying maker of the note in the

amount of $771,540.69, being said William L. Peterson, Jr. On December 7, 1983, William L. Peterson, Jr., as General Partner of Dominion-Bricktown Co., an Oklahoma General Partnership entered into a Promissory Note with Southwestern Bank & Trust Co., Petitioner's Exhibits No.18 and 24, in the principal amount of $771,540.69. *Southwestern Bank & Trust Company, Plaintiff, v. Burton E. Smith and J. Kirk Ashford*, supra, William L. Peterson, Jr., Pro se filed his Answer of William L. Peterson, Jr., Third Party Defendant, acknowledged being the maker of the said $771,504.69 note to Southwestern Bank & Trust Co., but denied personal liability, see Petitioner's Exhibit No. 20. However, on September 4, 1984, in United States Bankruptcy Court, for the Western District Court, *IN RE WAREHOUSE DEVELOPMENT CO.*, an Oklahoma Corporation, Case No. BK-84-2739-B,[Chapter 11] Voluntary Petition filed on September 14, 1984, said William L. Peterson, Jr., is shown as a shareholder of said general partnership and acknowledged indebtedness in the amount of $850,031.77 (being principal and accrued interest on Promissory Note, Petitioner's Exhibit No. 18 and 24 to date of filing bankruptcy petition) payable to Southwestern Bank &

Trust Company, Petitioner's Exhibit No.21. However, Southwestern Bank & Trust Co. did not name, either, Dominion-Bricktown Co., nor William L. Peterson, Jr., the maker and guarantor as a party defendant in their suit to collect said Promissory Note, Petitioner's Exhibit No. 18 and 24. *IN RE WAREHOUSE DEVELOPMENT CO., an Oklahoma General Partnership*, Case No.BK-84-2740-B [Chapter 11] Voluntary Petition filed on September 14, 1984, said William L. Peterson, Jr., is shown as a general partner and acknowledges indebtedness in the amount of $850,031.77, payable to Southwestern Bank & Trust Co., Petitioner's Exhibit No. 21. On November 1, 1984, *Southwestern Bank & Trust Company, Plaintiff, v. Burton E. Smith and J. Kirk Ashford*, supra, Southwestern Bank & Trust Co, as Plaintiff, filed Plaintiff's Brief in Response to Defendants' Opposition to Motion of Plaintiff for Summary Judgment, Petitioner's Exhibit No. 22, which sought summary judgment against Burton E. Smith and J. Kirk Ashford, not either the maker William L. Peterson, Jr. or Dominion-Bricktown Co., Petitioner's Exhibit No. 18 and 24, or William L. Peterson, Jr. as guarantor, Petitioner's Exhibit No. 19. On November 18, 1984, Southwestern Bank & Trust

Company, in said Bankruptcy Cases No. BK-84-2739-B and No.BK-84-2740-B, filed a Motion and Brief in Support of Abandonment of Property, see Petitioner's Exhibit No. 23. Southwestern Bank & Trust Co., Petitioner's Exhibit No. 23, did not raise the issue in bankruptcy court that said William L. Peterson, Jr., had personal joint and several liability to said Bank, as Maker of Promissory Note, Petitioner's Exhibit No. 18 and 24, and as guarantor, Petitioner's Exhibit No. 19, of said Promissory Note. Also, said William L. Peterson, Jr. did not disclose to the bankruptcy court, either, is personal guarantee Petitioner's Exhibit No. 19. of said Promissory Note, Petitioner's Exhibit No. 18 and 24, nor his personal liability as maker of said Promissory Note.

The above series of transactions appears as though as partner of Dominion-Bricktown Co., William L. Peterson, Jr., while serving as Conservator of the parties marital estate, obtained a loan on December 7, 1983, through a Promissory Note, Petitioner's Exhibit No. 18 and 23, in the principal sum of $771, 540.69, from Southwestern Bank & Trust Co., a bank controlled by Respondent's father, Jack H. Abernathy. The loan was obtained with out of state guarantors, in addition to

the guarantee of William L. Peterson, Jr., Petitioner's Exhibit No. 19. No principal nor interest payments were paid on the Promissory Note, Petitioner's Exhibit No. 18 and 23 and on June 22, 1984, Southwestern Bank & Trust Co., filed suit in federal district court to collect said Promissory Note pursuant to Guarantee of Payment, Petitioner's Exhibit No. 19, from out of state guarantors, only, and succeeded in obtaining judgment only on the out of state guarantors. During the course of the loan collection suit in federal district court, William L. Peterson, Jr., placed Dominion-Bricktown in voluntary bankruptcy (Chapter 11), remaining in control of the real property, which was also, security for said loan and Promissory Note. Thereafter, Southwestern Bank & Trust Company collects for the indebtedness on the Promissory Note, Petitioner's Exhibit No. 19 and 24, on the federal district court judgment from the out of state guarantors. William L. Peterson, Jr. then transfers the real property securing the Promissory Note to the Bank. William L. Peterson, Jr. keeps the $771,540.69. Southwestern Bank & Trust Co has the real property and the proceeds collected from the judgment obtained from out of state guarantors, thus

being made whole on the complex series of transaction. The out of state guarantors fund the transaction for Southwestern Bank & Trust Co. William L. Peterson, Jr. is relieved from apparent obligation to the out of state guarantors via the bankruptcy proceedings of Dominion-Bricktown Co. The Federal Deposit Insurance Corp. and customers of Southwestern Bank guarantee the solvency of the transactions at virtually no risk to Jack H. Abernathy. A vehicle of creative financing has compensated William L. Peterson, Jr. for his services rendered on behalf of Respondent in the trial court divorce proceedings in a sum greater than three-quarter of a million dollars. This transaction has all appearances of the sale of the administration of justice as prohibited by Okla. Const. Art. 2., Sec. 5."

The above described transaction has similar structure of an ABC oil and gas financing transaction, where the owner of an oil property sold it, for cash, free and clear of any indebtedness using a mortgage to a bank and the purchaser acquired the property subject to the full indebtedness. The above transaction is, a variation on the ABC oil and gas financing transaction, where the guarantors were saddled with the

indebtedness, the conservator received the cash proceeds from the loan and the bank acquired real property free of indebtedness.

Application and Petition, see Original Record, beginning page 20, line 6, "The Supreme Court of the State of Oklahoma on April 25, 1985, affirmed the reinstatement of said William L. Peterson, Jr., as Conservator in this divorce proceeding, *Mothershed v. Mothershed*, Case No. 59,979, Petitioner's Exhibit No. 25.

"Subsequent to the Journal Entry of judgment (T.R.645-681), Petitioner's Exhibit No. 1, said William L. Peterson, Jr., Conservator had surrendered substantial property to Plaintiff, without any order of this Court but no property whatsoever was surrendered to Defendant.

"Prior to filing this Application to Assume Jurisdiction and Petition to vacate, Defendant has conducted substantial pre-filing investigation of the personal finances of the herein Trial Judge Stewart M. Hunter, because during the month of October, 1982, prior to the November 19, 1982, Journal Entry of judgment, Petitioner's Exhibit No.1, (T.R.645-681), Defendant was approached by a prominent Oklahoma City Trial

Lawyer claiming he could obtain favorable results in this divorce proceeding for the sum of $125,000. From Defendant's pre-filing investigation of the fiances of said Stewart M. Hunter, Defendant has discovered the approximate amount of value of property was acquired by said Trial Judge during the pertinent period of time, as had been solicited by the attorney claiming he could obtain favorable results for Defendant."

X. Interested Parties

1. An interested party to all matters herein stated is respondent in the case below: Carrilee A. Bell, 2601 N.W. Expressway, Suite 333 W, Oklahoma City, Oklahoma 73112. Said interested party was respondent in the court below and plaintiff in the trial court, the Oklahoma County District Court, State of Oklahoma case styled *Mothershed v. Mothershed*, case no. JFD-81-1918.

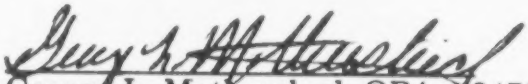
2. An interested party to matters herein stated is Susan B. Loving, Esq., Attorney General, State of Oklahoma, 2300 N. Lincoln Boulevard, State Capital Building, Room 112, Oklahoma City, Oklahoma 73105-4894, Telephone (405) 521-3921. Said Attorney General is an interested party herein because this application for a writ of mandamus contains a

United States Constitutional challenge to the validity of a state statute, Oklahoma Statutes Annotated (1991), Title 12, Sec. 1031(a) and 1038.

XI. Conclusion

For these reasons, this petition for a writ of mandamus should be granted and the Respondents, Honorable Marian P. Opala, Honorable Ralph B. Hodges, Honorable Robert E. Lavender, Honorable Robert D. Simms, Honorable Joseph M. Watt, Honorable Rudolph Hargrave, Honorable Justice Alma Wilson, Honorable Yvonne Kauger, and Honorable Hardy Summers Justices of the Supreme Court for the State of Oklahoma, requiring, directing and commanding the court below to reverse the February 25, 1992, Order, in Case No. 78,759, set forth in Appendix A, *infra*, Petitioner's Exhibit No. 1; the court below vacate the trial court Journal Entry of judgement, dated November 19, 1982, in the Oklahoma County District Court, State of Oklahoma case styled *Mothershed v. Mothershed*, Case No. JFD-81-1918, including all proceedings thereon, and remand this action to the trial court for a new

trial and for such other and further relief as the Court may deem just and proper in the circumstances.



George L. Mothershed, OBA #6472
Petitioner, Pro se
115 Alpine Avenue
Los Gatos, CA 95032-7130
Telephone (408) 395-7963

Appendix A

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, February 25, 1992

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

. . .

78,759 George L. Mothershed v. Carrilee Abernathy Bell, Formerly Carrilee A. Mothershed.
Application to assume original jurisdiction to entertain petition to vacate judgment denied; request by respondent for sanctions denied.
CONCUR: Hodges, V.C.J., Lavender, Simms, Doolin, Hargrave, Wilson, Summers, JJ.
NOT PARTICIPATING: Opala, C.J.

. . .

S/ Marian P. Opala
CHIEF JUSTICE

PETITIONER'S EXHIBIT NO. 1

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, February 25, 1992

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

. . .

78,759 George L. Mothershed v. Carrilee Abernathy Bell, Formerly Carrilee A. Mothershed.
Application to assume original jurisdiction to entertain petition to vacate judgment denied; request by respondent for sanctions denied.
CONCUR: Hodges, V.C.J., Lavender, Simms, Doolin, Hargrave, Wilson, Summers, JJ.
NOT PARTICIPATING: Opala, C.J.

. . .

S/ Marian P. Opala
CHIEF JUSTICE

PETITIONER'S EXHIBIT NO. 1

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, December 17, 1991

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDER:

. . .

78,759 GEORGE L. MOTHERSHED V. CARRILEE ABERNATHY BELL, formerly CARRILEE ABERNATHY MOTHERSHED

Respondent, Carrilee Abernathy Bell, formerly Carrilee Abernathy Mothershed, is ordered to respond by no later than January 22, 1992.

Oral presentation to a referee of this court is set for February 12, 1992 at 1:30 p.m.

. . .

S/ Marian P. Opala
CHIEF JUSTICE

PETITIONER'S EXHIBIT NO. 2

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Friday, January 24, 1992

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDER:

78,759 GEORGE L. MOTHERSHED V. CARRILEE ABERNATHY BELL

Filings of respondent of January 21, 1992 shall be considered as a response with oral presentation remaining as heretofore scheduled.

. . .

S/ Marian P. Opala
CHIEF JUSTICE

PETITIONER'S EXHIBIT NO. 3